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Administration of justice at the United Nations

Letter dated 7 October 2011 from the Secretary-General addressed to the President of the General Assembly

I have the honour to transmit the letter dated 5 October 2011 that I received from Judge Memooda Ebrahim-Carstens, President of the United Nations Dispute Tribunal (see annex), forwarding observations by the judges of the Dispute Tribunal on the recommendations contained in my report on the administration of justice at the United Nations (A/66/275) and the report of the Internal Justice Council (A/66/158), due to be considered by the Sixth Committee under agenda item 143.

Judge Ebrahim-Carstens requests that the letter and its enclosure be circulated as a document of the General Assembly.

(*Signed*) **BAN** Ki-moon

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Annex

I have the honour to write to you on behalf of the judges of the United Nations Dispute Tribunal to convey our concern regarding certain recommendations contained in the report of the Secretary-General (A/66/275) and the report of the Internal Justice Council (A/66/158) under item 143 of the agenda of the General Assembly, entitled "Administration of justice at the United Nations". In this regard, I am attaching a document which includes brief observations by the judges of the Dispute Tribunal on the above-mentioned reports (see enclosure).

I should be grateful if the present letter and its enclosure could be communicated to the President of the General Assembly for its transmittal to, and consideration by, the Sixth Committee, and for its circulation as a document under agenda item 143.

(*Signed*) Memooda **Ebrahim-Carstens**
President

Enclosure

Administration of justice at the United Nations

Observations by the judges of the United Nations Dispute Tribunal on recommendations contained in the report of the Secretary-General (A/66/275) and the report of the Internal Justice Council (A/66/158)

1. After much careful thought, the judges of the Dispute Tribunal have decided that it is their duty to the General Assembly, as independent judges, to present a balanced view of the issues currently being canvassed in the report of the Secretary-General (A/66/275) and in the report of the Internal Justice Council (A/66/158) under item 143 of the agenda, in relation to the work of the Tribunal.

2. In particular, the judges are concerned about what appears to be an attempt in the report of the Secretary-General to undermine the integrity of the Tribunal and its independence by presenting a misleading and one-sided account of the Dispute and Appeals Tribunals' case law. The judges are further of the view that, in any event, it is premature to propose fundamental changes to the Statute of the Tribunal based on only two years' experience.

3. In recognition and appreciation of the heavy workload of the General Assembly, the judges will make hereinafter a few brief observations and remain available, if requested, to provide further information or clarification.

Suspensory effect of appeals of interlocutory orders

(See A/66/275, paras. 264-266)

4. At paragraph 266 of the report, the Secretary-General recommends amendments to the Statutes of the Dispute and Appeals Tribunals to ensure that: (a) interlocutory orders issued by the Dispute Tribunal may be subject to appeal; and (b) that such appeal should have the effect of suspending the execution of such orders.

5. Firstly, the issue of appeals against interlocutory orders is already well settled in the case law of the Appeals Tribunal. In *Bertucci* (Judgement No. 2010-UNAT-062), the United Nations Appeals Tribunal stated that the Dispute Tribunal "is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and to do justice to the parties", and that the Appeals Tribunal "will not interfere lightly with the broad discretion of the Dispute Tribunal in the management of cases". The Appeals Tribunal concluded that, "generally, only appeals against final judgements are receivable", noting that "[c]ases before the United Nations Dispute Tribunal could seldom proceed if either party were able to appeal to the Appeals Tribunal if dissatisfied with an interlocutory decision". In its jurisprudence, the Appeals Tribunal has clarified that appeals against interlocutory orders may only be entertained when the Dispute Tribunal exceeds its jurisdiction. The issue having been decided by the Appeals Tribunal, any change to the statute is unnecessary.

6. Secondly, the report of the Secretary-General does not provide a fair representation of the scope and purpose of the amendment to article 19 of the Rules of Procedure, as adopted by the judges of the Dispute Tribunal. The amendment to article 19 is necessary to secure compliance with the Tribunal's interlocutory orders.

At paragraph 265, the report misinterprets this amendment as "codifying" the authority of the Tribunal to prohibit the party appealing an interlocutory order from appearing before it. This is a misrepresentation, and the amendment simply allows the Tribunal to impose appropriate sanctions for the failure by a party to comply with case management orders, and is a common provision in many national and international jurisdictions.

7. Thirdly, the recommendation of the Secretary-General would mean that an appeal against an interlocutory order (e.g., an order to produce a document or to summon a witness) would put the case before the Dispute Tribunal on hold pending the determination of the appeal, also blocking the Tribunal's case management powers as stated by the Appeals Tribunal in *Bertucci*. It would enable either party to paralyze the process, thus preventing the Dispute Tribunal from the speedy and cost-efficient disposal of cases for which it has been praised by the General Assembly.

8. Fourthly, in the case of orders suspending the implementation of the contested administrative decision, the recommended automatic suspension pending appeal would nullify the power of the Tribunal to grant interim relief, since the Administration could unilaterally block the execution of such an order by filing an appeal. The stay of execution of orders would render the granting of suspension of action orders obsolete.

9. Finally, it should be noted that, on 3 October 2011, the Appeals Tribunal rendered a judgement in which it reiterated its established jurisprudence that "appeals against most interlocutory decisions will not be receivable, for instance, decisions on matters of evidence, procedure, and trial conduct", and that "[a]n interlocutory appeal is only receivable in cases where the Dispute Tribunal has clearly exceeded its jurisdiction of competence". In the same judgement, the Appeals Tribunal pointed out that article 8, paragraph 6, of its rules of procedure (according to which "[t]he filing of an appeal shall suspend the execution of the judgement contested") "does not apply to interlocutory appeals", and that "[i]t falls to the Appeals Tribunal to decide whether the United Nations Dispute Tribunal exceeded its jurisdiction and the Administration cannot refrain from executing an order by filing an appeal against it on the basis that the Dispute Tribunal exceeded its jurisdiction" (*Villamoran* 2011-UNAT-160).

10. For all these reasons, the judges strongly oppose this recommendation, which would render meaningless the exercise of the jurisdiction vested in the Dispute Tribunal.

Jurisdiction of the Dispute Tribunal over acts and omissions by independent entities in connection with the performance of their operational mandates

(See A/66/275, paras. 270-293)

11. The examination of this issue in the report of the Secretary-General includes several inaccuracies and misinterpretations regarding the case law of the Dispute and Appeals Tribunals.

12. With respect to the Office of Internal Oversight Services (OIOS), the report (notably, at para. 273 (a)) omits any reference to various published rulings in which the Dispute and Appeals Tribunals have clearly stated that OIOS decisions fall under the Dispute Tribunal's jurisdiction (see *Nwuke* 2010-UNAT-099, *Comerford-Verzuu*

UNDT/2011/005, *Kunanyakan* UNDT/2011/006, and *Hashimi* order No. 29 (NY/2011) (on suspension of action)).

13. Similarly, with respect to the Ethics Office, the statement (see A/66/275, para. 273 (b)) that the Dispute Tribunal "has not yet issued a final judgement addressing the issue of whether a determination made by the Ethics Office regarding retaliation constitutes an administrative decision" is incorrect. In *Hunt-Matthes* UNDT/2011/063 and *Wasserstrom* order No. 19 (NY/2010), the Dispute Tribunal determined that decisions of the Ethics Office not to find prima facie retaliation have direct consequences for the rights of the applicant, thus making them appealable administrative decisions. This issue is yet to be determined by the Appeals Tribunal.

14. With respect to the Office of Staff Legal Assistance, the report of the Secretary-General (at para. 273 (c)) appears to ignore the existing jurisprudence of the Dispute and Appeals Tribunals. In *Larkin* UNDT/2011/028 and *Worsley* UNDT/2011/024, the Tribunal found that while the Office of Staff Legal Assistance enjoys functional or operational independence, its decision whether or not to represent a staff member constitutes an administrative decision within the meaning of article 2, paragraph 1 (a), of the statute. The Appeals Tribunal held in *Larkin* 2011-UNAT-135 that decisions taken by the Office of Staff Legal Assistance may have an impact on a staff member's terms of appointment and therefore may fall within the jurisdiction of the Dispute Tribunal, without it interfering with the professional independence of counsel.

15. The statement contained at paragraph 274 of the report, that "any guidance of the Appeals Tribunal on these issues may not necessarily be dispositive, as the Dispute Tribunal has emphasized that it will consider rules established by the Appeals Tribunal to be applicable only where they are in 'conformity with general principles of law'" is misleading. This statement (which is repeated also at para. 290 of the report) quotes one decision of the Dispute Tribunal and misinforms the reader about the true extent of the reliance of the Dispute Tribunal in countless cases on the rulings of the Appeals Tribunal as well as on the judgements of the former Administrative Tribunal.

16. The Secretary-General recommends to the General Assembly, at paragraph 280 of his report, that article 2, paragraph 1 (a), of the statute of the Dispute Tribunal be amended to refer to "an administrative decision unilaterally taken by or on behalf of the Secretary-General that is alleged to be in non-compliance with the terms of appointment or the contract of employment". This recommendation is questionable for several reasons.

17. Firstly, the recommendation is based entirely on the alleged ambiguity of the jurisprudence of the Dispute and Appeals Tribunals. As shown above, the jurisprudence in the field is clear.

18. Secondly, the amendment would mean that staff members would be deprived of the possibility of challenging a decision of any of these independent entities before the formal system of administration of justice. This would be tantamount to allowing these entities to exercise power without accountability. The recommendation would consequently raise serious concerns regarding the respect for the rule of law within the Organization, especially taking into account the far-reaching consequences for staff members of decisions taken by such independent entities.

19. Thirdly, because of its imprecise formulation, the amendment could be interpreted by some as meaning that the Organization should be absolved of any responsibility for the conduct of its managers when it can be shown that they acted *ultra vires*, since such conduct would not have truly been carried out "on behalf of the Secretary-General".

20. For all these reasons, the judges oppose the recommendation of the Secretary-General (made twice in the report, at paras. 280 and 293), which is not in conformity with the philosophy and underlying purpose behind the reform of the system of administration of justice decided by the General Assembly.

21. The judges would like to make two additional observations on this section of the report.

22. With regard to paragraph 285, the judges note that the description and interpretation of the *Chen* case, affirmed by the Appeals Tribunal, is selective and misleading. The principle of equal pay for equal work, on the basis of which this case was decided, is a basic rule underlying the conditions of service of staff members and was clearly recognized by the former United Nations Administrative Tribunal (see judgements No. 1113 *Janssen* (2003); No. 1115 *Ruser* (2003) and No. 1450 *Valdes* (2009)).

23. With regard to the examples described in paragraphs 286 to 288 of the report (regarding the International Civil Service Commission), the judges observe that these examples relate to live cases in which the Secretary-General appears before the Tribunal as a party. The discussion in the report of these cases, which are clearly *sub judice*, pending their consideration by the Tribunal, seriously undermines the independence of the formal system of administration of justice and is tantamount to contempt of court.

Redaction of names of staff members

(See A/66/275, paras. 260-263)

24. Paragraph 261 of the report states that staff members identified in judgements of the Tribunal have filed "complaints against judges". The judges concerned have not been informed of the existence or content of any such complaints. The view expressed in the same paragraph of the report, that these complaints "raise concerns about defamation", is legally inappropriate. It is a universal principle inherent to the independence and integrity of the judiciary that judges should enjoy personal immunity in the exercise of their judicial functions and are therefore not subject to complaints for defamation.

25. At its last plenary in New York in June 2011, the Tribunal determined that the redaction of names would be decided on a case-by-case basis and in the light of the circumstances and nature of a case, having full regard to the need to avoid innocent individuals from being identified while ensuring that full effect is given to the principles of transparency and accountability, which are cornerstones of the new system of internal justice. A change in the statute is therefore unnecessary.

Audio recordings of oral hearings

(See A/66/275, paras. 256-259)

26. Paragraph 259 of the report recommends that the General Assembly revise article 7 of the statute of the Dispute Tribunal to "provide that audio recordings or

oral hearings before the Tribunal are to be maintained and made available to the parties upon request". Preparation of professional, fully reliable audio recordings, as well as transcripts, requires professional technical equipment and other resources that the Registries just do not have at the present time. While the Tribunal agrees that audio recordings must be maintained, a proper budgetary allocation should be made to allow for them. Other issues arising are to whom and for what reasons recordings should be provided, bearing in mind the immunity attaching to witnesses and representatives for what is said in court.

Mechanism for addressing complaints against judges

(See A/66/275, paras. 52-60 and A/66/158, para. 7)

27. At paragraph 54 of his report, the Secretary-General recommends, in the absence of a mechanism to deal with complaints against judges, that the General Assembly, as an interim measure, authorize the Internal Justice Council "to investigate complaints that arise against judges, including any complaints that have already arisen, and to provide its report and recommendations on these complaints to the Assembly for any action that it may deem appropriate". On its part, the Internal Justice Council proposes, in its report, that all such complaints be placed before a panel composed of the three external members of the Council.

28. It is the judges' view that, as an interim measure, such complaints should be reviewed by a panel consisting of the President and two judges. The composition of the Internal Justice Council, which includes staff and management representatives, disqualifies it for this task. Furthermore, the body responsible for selecting and recommending candidates to the General Assembly for appointment as judges should not play a key role in the complaints procedure.

29. The judges against whom complaints have apparently been filed have not been notified of the existence and nature of such complaints. In the absence of a code of conduct approved by the General Assembly, any action for misconduct or incapacity initiated against them would contradict the principle of legality. For these reasons, the judges would oppose investigations carried out with regard to past complaints of which they have not been informed.

Recourse mechanisms for non-staff personnel

(See A/65/275, paras. 190 and annex II)

30. At paragraph 190 and in annex II of the report of the Secretary-General, it is proposed that non-staff personnel should not have access to the Dispute Tribunal and that instead they should avail themselves of an arbitration mechanism. The judges submit that the Dispute Tribunal may be an appropriate forum for non-staff personnel to have recourse to judicial proceedings. The setting up of a new mechanism will inevitably incur new and substantial costs, while access to the existing Tribunals will be more cost effective and efficient.